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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In re Applications of ) MM DOCKET NO. 93-51 ✓  
)  
MARTHA J. HUBER ) File No. BPH-911114ME  
)  
RITA REYNA BRENT ) File No. BPH-911115MC  
)  
MIDAMERICA ELECTRONICS SERVICE, INC. ) File No. BPH-911115ML  
)  
STATON COMMUNICATIONS, INC. ) File No. BPH-911115MU  
)  
For Construction Permit for a )  
New FM Station on Channel 234A )  
in New Albany, Indiana )

MEMORANDUM OPINION AND ORDER

Issued: June 25, 1993

Released: June 28, 1993

Background

1. This is a ruling on a Request For Permission To File Appeal that was filed by Rita Reyna Brent ("Brent") on June 21, 1993. At the request of the Presiding Judge, an Opposition was filed by Martha J. Huber ("Huber") on June 22, 1993.<sup>1</sup>

2. Brent seeks a revisit to a ruling in which financial issues were added. See Memorandum Opinion And Order, FCC 93M - 374, released June 17, 1993. The issues added are to determine whether Brent was financially qualified when she filed her application and whether she is financially qualified at the present time. The Presiding Judge added the issues because a Declaration disclosed that Brent had reviewed a financial sheet and documents showing after tax net income. It was not stated whether the financials were joint or individual although the financial disclosure in the Form 301 reflects joint financing of Brent with her husband. Also, the Declaration failed to state whether there was a document reflecting cost estimates. These facts, albeit negative facts, reached the threshold of substantial questions about whether a reasonable assurance was lacking when Ms. Brent certified.

3. Brent submits another Declaration with her Request in which she declares that she had been referring to a joint balance sheet. The

<sup>1</sup> Pleadings responsive to interlocutory appeal requests shall be filed only if requested by a presiding officer. 47 C.F.R. §1.301(b). Since Brent has made a new proffer of fact with her Request (Declaration dated June 21, 1993), it was considered to be appropriate to request a responsive pleading from an opposing party.

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explanation does not alter the fact that the Presiding Judge acted on what was before him when the question of adding an issue was under consideration. To consider an untested Declaration which materially alters the facts and which is offered in conjunction with a request for interlocutory appeal would add an unauthorized procedural dimension to an interlocutory appeal which, if accepted, would prejudice an opposing party.<sup>2</sup>

4. In addition, it is noted that an acknowledged concern of the Presiding Judge regarding the absence of any proffer of cost estimates still has not been addressed by Brent. Brent notes that a written cost estimate is not a document which is called for by the Form 301 Instructions. But Huber cites authority which holds that an applicant must show that it engaged in "serious and reasonable efforts to ascertain predictable construction and operation costs." Northampton Media Associates, 4 F.C.C. Rcd 5517, 5519 (Comm'n 1989). Huber also asks that Brent produce the documents which Huber requests in her motion to add the issues which request included cost estimates. Under the circumstances there is cause for the production of her cost estimates.<sup>3</sup>

5. A request for an interlocutory appeal must contain:

A showing that the appeal presents a new or novel question of law or policy and that the ruling is such that error would be likely to require remand should the appeal be deferred and raised as an exception.

47 C.F.R. §1.301(b). There is no new or novel question of law or policy in the contested ruling. The Presiding Judge ruled on the facts as they were presented to him. The addition of issues is discretionary with the Presiding Judge and is not an appropriate subject for extraordinary relief. Modesto Broadcast Group, 5 F.C.C. Rcd 4674, 4675 (Review Bd 1990).

#### Rulings

Accordingly, IT IS ORDERED that the Request For Permission To File Appeal filed by Rita Reyna Brent on June 21, 1993, IS DENIED.

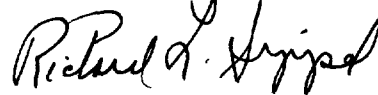
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<sup>2</sup> As indicated in fn.1 above, there is no right to an opposition to a request for an interlocutory appeal. It would be fundamentally unfair to allow newly proffered evidence under the limited procedure for interlocutory appeals where there is no right to respond to the new proffer.

<sup>3</sup> In the ruling adding the issues (FCC 93M-374), the Presiding Judge ordered Brent to produce all documents that she relied on for her financial certification. Those documents must be produced by 4:00 p.m. on Monday, June 28, 1993. See Order 93M-390, released June 23, 1993 (stay granted on Brent's production pending this ruling on appeal request).

IT IS FURTHER ORDERED that the documents requested by Martha J. Huber, all documents used to estimate costs, and all other documents relied on by Rita Reyna Brent for her financial certification SHALL BE PRODUCED to counsel for Huber by 4:00 p.m. on June 28, 1993.<sup>4</sup>

FEDERAL COMMUNICATIONS COMMISSION



Richard L. Sippel  
Administrative Law Judge

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<sup>4</sup> Counsel for Brent and counsel for Huber were advised to pick up copies of this ruling from the office of the Presiding Judge on the date of issuance.